Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2086

In the Supreme Court of the United States

OCTOBER TERM, 1980

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL., PETITIONERS

v.

KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240	4, 5
Bush v. *Bays*, 463 F. Supp. 59	5
Equal Employment Opportunity Commission v. *Kenosha Unified School District No. 1*, 620 F.2d 1220	5
National Association for the Advancement of Colored People v. *Civiletti*, 609 F.2d 514, cert. denied, 447 U.S. 922	5
Shannon v. *United States Department of Housing & Urban Development*, 577 F.2d 854, cert. denied, 439 U.S. 1002	5
Southeast Legal Defense Group v. *Adams*, 436 F. Supp. 891	5
Staten v. *Housing Authority of the City of Pittsburgh*, 639 F.2d 599	5
United States v. *King*, 395 U.S. 1	5
Constitution and statutes:	
United States Constitution:	
First Amendment	1, 3
Fourteenth Amendment	1, 3
Civil Rights Attorney's Fees Awards Act of 1976 (Awards Act), 42 U.S.C. 1988	2, 4, 5
Department of Education Organization Act, 20 U.S.C. (Supp. III) 3401 *et seq.*	1
Equal Access to Justice Act, Pub. L. No. 96-481, Section 201, 94 Stat. 2325 *et seq.*	5
28 U.S.C. 2412	4, 5
42 U.S.C. (& Supp. III) 1983	3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2086

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL., PETITIONERS

v.

KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

This action, seeking injunctive relief under civil rights legislation and the First and Fourteenth Amendments, was brought by Respondent Knights of the Ku Klux Klan, Realm of Louisiana (KKK) against Petitioner East Baton Rouge Parish School Board and the Department of Health, Education, and Welfare.[1] After the KKK prevailed, the court of

[1] The education functions of HEW have now been transferred to the respondent Department of Education pursuant to the Department of Education Organization Act, 20 U.S.C. (Supp. III) 3401 *et seq.*

appeals held that the Civil Rights Attorney's Fees Awards Act of 1976 (Awards Act), 42 U.S.C. 1988, does not waive the government's immunity from an award of attorneys' fees, but does provide for an award of attorneys' fees against petitioner. The court below remanded for a determination of what amount, if any, should be assessed. Petitioner challenges both aspects of the court of appeals' decision, arguing that the Awards Act authorizes attorneys' fees against the government and that the Act does not authorize an award against petitioner because (1) special circumstances render the award unjust, and (2) the Act should not be applied to this case, which was commenced before the Act's effective date.

1. On November 17, 1975, petitioner granted the KKK permission to use a high school gymnasium for a "patriotic meeting" on the night of November 22, 1975. 578 F.2d 1122, 1123, 1136 (1978). Three days later, however, the Board rescinded its approval, "prompted at least in part" by a November 19 telephone call from Dr. John Bell, chief of the Dallas, Texas Branch Office for Civil Rights of HEW. *Id.* at 1123, 1131. In this first of two communications to the Board, Dr. Bell advised that permitting the KKK the use of the gym would violate regulations promulgated under statutes controlling federal aid received by the school district and warned that his office would begin enforcement proceedings to terminate that federal aid if the use was allowed. *Id.* at 1123, 1137-1138. In a November 21 telegram, however, Dr. Bell explained to the Board that the statutory and regulatory prohibitions on racial dis-

crimination which he had cited in his telephone call "cannot be read to authorize conduct constituting an impermissible abridgement of First Amendment rights," and noted that conduct required by the First Amendment could not be grounds for enforcement proceedings. *Id.* at 1123-1124, 1139.

Upon the Board's cancellation of the permit, the KKK initiated this suit against the Board under 42 U.S.C. (& Supp. III) 1983 and the First and Fourteenth Amendments, later amending its complaint to include HEW and also to challenge an official policy regarding use of school facilities adopted by the Board on February 19, 1976. 578 F.2d at 1124. That policy, endorsed by the Board three months after Dr. Bell's telephone call, provided in part for the denial of permits for the use of school facilities to any persons advocating racial discrimination. *Id.* at 1124, 1144-1145.

The United States District Court for the Middle District of Louisiana denied the injunctive relief requested by the KKK and ruled that the new Board policy did not violate First and Fourteenth Amendment rights. 578 F.2d at 1124. The Fifth Circuit reversed and remanded. *Id.* at 1128. On remand, the district court entered a preliminary injunction against the defendants, held a trial on the merits, and ultimately ruled in favor of the KKK (Pet. App. A-1). The court not only permanently enjoined the Board from using the beliefs advocated by applicants as a criterion for granting or denying permits, it also ordered HEW to refrain from interfering with the KKK's legitimate use of East Baton Rouge Parish School District facilities (Pet. App. A-1 to A-3).

In a subsequent order, the district court adjudged HEW liable to the KKK for $11,681.25 in attorneys' fees and $239.16 in costs, while releasing the Board

from any responsibility for such fees or costs (Pet. App. A-5). HEW appealed from the award of attorneys' fees (but not costs) against it, and the KKK cross-appealed on the issue of the Board's liability for attorneys' fees. The court of appeals reversed on both issues, holding that the doctrine of sovereign immunity, codified in 28 U.S.C. 2412, barred the award of attorneys' fees against the United States in this case (Pet. App. A-8, A-11). The court rejected petitioner's contention that the Awards Act, 42 U.S. 1988, waives federal sovereign immunity, noting that such a waiver must be clear and express (Pet. App. A-8, citing *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 (1975)). The court held that Section 1988 does provide, however, for the imposition of fees against the petitioner because no "special circumstances" exist that would render such an award "unjust" (Pet. App. A-11, A-15). Moreover, the court held that attorneys' fees could be awarded against the Board under the Awards Act even though this suit had been commenced prior to the effective date of the Act, because such an award would not be "manifestly unjust" (Pet. App. A-16, A-17). The court remanded the case for a determination of what amount, if any, of attorneys' fees would be reasonable to assess against the Board.

2. The holding of the court of appeals that the Civil Rights Attorney's Fees Awards Act of 1976 does not waive federal sovereign immunity is correct and does not conflict with any decision of this Court or other courts of appeals. Accordingly, further review on that issue is unwarranted.

Although it has never ruled on the precise issue petitioner raises, this Court consistently has held that waivers of federal sovereign immunity "cannot be implied but must be unequivocally expressed."

United States v. *King*, 395 U.S. 1, 4 (1969). Specifically as to attorneys' fees, this Court held in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), that 28 U.S.C. 2412 "on its face, and in light of its legislative history" generally bars awards of attorneys' fees unless they are "expressly provided for by statute." *Id.* at 267-268.

Studiously observing this interpretation of Section 2412, two other courts of appeals, in addition to the Fifth Circuit below, have carefully examined the exact issue raised in the petition and have reached the same conclusion. *National Association for the Advancement of Colored People* v. *Civiletti*, 609 F.2d 514 (D.C. Cir. 1979), cert. denied, 447 U.S. 922 (1980); *Shannon* v. *United States Department of Housing & Urban Development*, 577 F.2d 854 (3d Cir.), cert. denied, 439 U.S. 1002 (1978). See also *Southeast Legal Defense Group* v. *Adams*, 436 F. Supp. 891 (D. Ore. 1977).[3] After full consideration of the language and legislative history of the Awards Act, the courts of appeals have thus uniformly held that the Awards Act does not contain the clear, express waiver of sovereign immunity that statute and precedent require.

Moreover, Congress recently enacted the Equal Access to Justice Act, Pub. L. No. 96-481, Section 201, 94 Stat. 2325 *et seq.*, effective October 1, 1981. That statute will make the United States liable for costs and attorneys' fees in certain situations in which the government has heretofore remained im-

---

[3] See also, in related contexts, *Staten* v. *Housing Authority of the City of Pittsburgh*, 638 F.2d 599, 602 (3d Cir. 1980); *Equal Employment Opportunity Commission* v. *Kenosha Unified School District No. 1*, 620 F.2d 1220, 1226-1227 (7th Cir. 1980); *Bush* v. *Bays*, 463 F. Supp. 59, 63 (E.D. Va. 1978).

mune. Particularly in light of Congress' effort, through this new and somewhat complex legislation, to address comprehensively the issue of the government's liability for attorneys' fees, there is no need for the Court to consider the issue in the previous statutory context.

3. The government takes no position on whether the court below correctly held that petitioner may be liable for attorneys' fees to the KKK (Pet. App. A-14 to A-17). We note, however, that the court of appeals' decision is interlocutory on this issue inasmuch as the court remanded for a determination of "what amount, if any, of attorneys' fees reasonably may be assessed against the Board" (Pet. App. A-17).

It is therefore respectfully submitted that, at least as to Question 1, the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 351984 887